In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 76

JAMES T. BENN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

The controversy in this case involves the determinations by the courts below that petitioner's cost basis in certain promissory notes was zero. The Tax Court found that petitioner had in fact no intention of honoring these notes and that he took steps to impede their collection. Petitioner has filed a reply brief in this Court which asserts that the courts below found petitioner's cost basis in notes *which he had in fact paid,* to be, nevertheless, zero. This statement is simply wrong. We are therefore filing this memorandum to refer the Court to the portions of the record that refute the seven specific examples that petitioner has constructed (Reply Br. 3):

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1. *The Viglianco note of $27,300.* There is no issue in this case as to the value of the $27,300 note that petitioner gave Viglianco and paid and had cancelled in 1950. Nor was there any issue as to the fact that petitioner did satisfy it. The issue was as to petitioner's cost basis in the property he transferred to Viglianco in satisfaction of the note. As the Tax Court found, petitioner had no cost basis in that property, and, thus, upon obtaining the cancellation of the note, he realized income in its full amount. (R. 2066–2070.)

2. *The Viglianco notes of $12,500.* The Tax Court properly found (based upon evidence of record involving failure of payment through non-existent Brazilian Cruzeiros) that this note had not been paid (R. 223, 2075–2076).

3. *The Glantz note of $11,000.* The Tax Court found that petitioner paid this note and allowed petitioner the face amount of the note in determining his costs (R. 2072).

4. *The Doeber notes of $5,250 and $1,980.* The Tax Court allowed the full amount of these notes in determining petitioner's cost basis in the Robinson Brick Company (R. 2071, 2072, 2076).

5. *The Redmon note of $9,350.* The Tax Court found on evidence of record that it had not been paid, and that petitioner did not intend to pay it (R. 258–260, 2073–2074).

6. *The Reison note of $4,500.* The Tax Court found the note had not been paid (R. 2090). Petitioner's citation to "Tr. 1328–1329" is in fact to sworn testimony denying that it was ever actually paid (reprinted at R. 1419–1421).

7. The Glantz note of $12,000. The record shows that $8,000 was paid, and that petitioner received full credit in computing his costs (R. 2080, 2093–2094).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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